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No. 325

# In the Supreme Court of the United States

OCTOBER TERM, 1961

CREST FINANCE CO., INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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### OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. 1a-7a) is reported at 291 F. 2d 1.

### JURISDICTION

The judgment of the court of appeals was entered on May 16, 1961. (Pet. 8a.) A timely petition for rehearing was denied on June 15, 1961. (Pet. 9a.) The petition for a writ of certiorari was filed on August 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether assignments to a finance company, as security for contemporaneous loans, of amounts due

to the taxpayer for work already performed gave rise to choate liens superior to a subsequently-arising federal tax lien.

## STATUTES INVOLVED

Sections 6321, 6322, and 6323(a) of the Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.) are set forth at pp. 9a–10a of the petition.

## STATEMENT

This proceeding arises from an action of interpleader brought by three firms doing business as Standard-Crowley-Jackson (hereinafter referred to as Standard) against petitioner Crest Finance Company, Inc., and others, as claimants to a fund in the amount of $17,369.94 owed by Standard to the Twin Excavating Company, Inc., the taxpayer, for the purpose of adjudicating the rights of parties to that fund. The competing claimants to the fund are the petitioner and the United States. (R. 21–22.)

Standard was the prime contractor for the construction of a certain portion of the Illinois Toll Road in the neighborhood of Harvey, Illinois. On September 20, 1957, the taxpayer entered into a subcontract with Standard for hauling and compacting excavated dirt. Under the terms of the contract, Standard agreed to make progress payments to the taxpayer for work performed, based upon estimates covered by weekly reports or invoices, predicated on a count of the number of loads of fill carried to the site of the construction. All the invoices contained the statement that the estimates were subject to revision as to exact quantity by the section engineer. (R. 25.)

From March 21, 1958, through June 10, 1958, the petitioner made nine loans to the taxpayer totaling $67,722.53. The loans were evidenced by the taxpayer's note and were secured by concurrent assignments of the taxpayer's right to payment from Standard for the work performed up to the date of each assignment, as estimated by the weekly invoices. The assignments covered a total of $124,739.29 of estimated amounts due. Standard was notified of the assignments but they were not recorded. (R. 26)

On May 9, 1958, Standard paid to the petitioner the sum of $44,316.45, by a check payable jointly to the taxpayer and the petitioner. Petitioner retained $30,000 in payment of the then outstanding amount of its loan and remitted the balance to the taxpayer. On July 24, 1958, Standard made a further payment of $20,000, all of which was applied by petitioner to its loans, leaving a balance of approximately $17,000 with interest still due on its loans to the taxpayer. (R. 27.)

At various periods after the assignments to the petitioner, from August 15, to November 14, 1958, the Commissioner of Internal Revenue made assessments against the taxpayer for amounts deducted and withheld by it from wages of its employees for withholding and Federal Insurance Contribution Act taxes.[1]

[1] The record does not show whether the withholdings were from wages paid in connection with work on the Standard subcontract or on other jobs, nor does it show the dates such amounts were withheld. Hence this case does not involve any claim by the United States under Section 7501 of the 1954 Code to a trust for such withheld amounts. Cf. *Hercules Service Parts Corp.* v. *United States*, 202 F. 2d 938 (C. A. 6).

Notices of lien for these assessments were filed from September 10, 1958, to January 20, 1959. An aggregate of $22,643.94 with interest and penalty became due and remains unpaid. (R. 23–24.)

The court of appeals, affirming the district court, held that the federal tax lien was superior to the prior assignment of the amounts due to petitioner and, consequently, that the United States was entitled to the interpleaded fund. (Pet. 1a–7a.)

DISCUSSION

The court of appeals held that this case was controlled by *United States* v. *Ball Construction Co.*, 355 U.S. 587, and that under that decision petitioner's lien upon the taxpayer's accounts receivable was inchoate and therefore ineffective against a subsequently-arising federal tax lien. Upon full consideration the government has concluded that the *Ball* case is not controlling and that, on the facts of this case, petitioner's lien was choate at the time of the tax assessment unless, as a matter of state law, the failure to record the assignment made it ineffective against third parties. It follows, in the government's view, that the reasoning of the court below was erroneous and the correctness of the judgment depends upon a question of state law which the court below did not decide.

Accordingly, we suggest that this Court should, without further consideration, grant certiorari, vacate the judgment and remand the case to the court of appeals (1) to reconsider the applicability of the *Ball* case in the light of the government's present view and

(2) if it accepts the concession, to determine whether the failure to record the assignment of the accounts receivable made it invalid against third parties.

In the event that this Court wishes to consider the issue more fully, however, we set forth below our reasons for concluding that the *Ball* case is not controlling and that there is an unresolved question concerning the effect of the failure to record the assignment.

1. Apart from the failure to record the assignment petitioner's lien was fully perfected and choate prior to the time the federal tax was assessed and the tax lien arose. The assignments were of amounts due under the terms of a specific contract for work already performed. They were made to secure payment of notes in specific amounts for loans made contemporaneously with the assignments. By the time the tax assessments were made, the taxpayer had completed performance of the contract, and all that remained to be done was the final computation of the precise amount due (to be based upon an engineering measurement of the compacted fill, instead of the truckload measurement on which the weekly estimates were based). Thus the lien fully met the requirements, enunciated by this Court, that it be specific and definite in three essential respects: (1) the identity of the lienholder (petitioner); (2) the amount of the lien (the notes); and (3) the property to which it attaches (the accounts receivable for the work already performed under the specific contract). *E.g., United States* v. *New Britain,* 347 U.S. 81.

That the amount owing to the taxpayer by Standard for the work performed was, at the date of the tax assessment, still subject to final computation and revision does not, we believe, affect the definiteness or specificity of the petitioner's lien. The property subject to the lien was the specific right to payment for work performed, and the indefiniteness of the amount due for that work goes, not to the definiteness of the lien (which was for the liquidated amount of the notes evidencing the loans from petitioner to the taxpayer), but to the value of the property subject to the lien. Just as a mortgage on real estate is not made inchoate because the value of the property (or even the mortgagor's title to it) is uncertain, so the petitioner's lien on the taxpayer's contractual right to payment for work performed is not made inchoate because the amount payable on the assigned right has not been finally ascertained. The requirement of definiteness of amount goes only to the debt secured by the lien, not to the property (otherwise specifically identified) that is subject to the lien.

The *Ball* case, by which the court below thought itself bound, is not to the contrary. In that case, a subcontractor assigned to the surety on its performance bond all amounts to become due under the subcontract. The assignment purported to serve as security not only for any loss the surety might sustain because of default on the subcontract but also for "any other indebtedness" the subcontractor might thereafter incur to the surety. The subcontract was completed without default, and, upon final acceptance of the work, the subcontractor became entitled to payment

of the retained percentages. Federal taxes were assessed against the subcontractor shortly before acceptance of the work and thus became a lien upon the amounts remaining due under the subcontract. At that time, the subcontractor had incurred no liability to the surety. However, after the tax liens arose and were recorded, the surety was required to expend sums to complete *another* contract on which it had assured the subcontractor's performance (under a separate performance bond). To recover for its loss on the second contract it asserted a prior right to the retained percentages due on the first contract. The issue, therefore, was whether an open-ended assignment, purporting to secure future contingent liabilities, was effective to give the assignee priority for an indebtedness that did not come into existence until after the federal tax lien arose and was recorded. This Court properly held that it did not, but that decision is in no way dispositive of this case, for here the indebtedness secured by the lien arose from advances made contemporaneously with the assignments. The difference between this case and *Ball,* in short, is that at the time the tax lien arose the indebtedness secured by the competing lien was, in *Ball*, not yet in existence and, in this case, fully liquidated.[2]

[2] The lower-court decisions following *Ball* on which the court of appeals relied are also distinguishable. In *United States* v. *Chapman*, 281 F. 2d 862 (C.A. 10), the record failed to show whether the taxpayer-contractor was entitled to receive progress payments at the time of the assignment, and the finance company there relied on its claim that it was a "purchaser" of the entire contract rights. In *First State Bank of Medford* v. *United States*, 166 F. Supp. 204 (D. Minn. 1958), the bank

Because of the way in which the arguments were presented to the court of appeals, that court did not have the benefit of full argument on the question whether the petitioner's lien was sufficiently choate to be protected against the subsequently-arising tax lien.[3] We believe the court of appeals should have an opportunity to reconsider its decision on that question in the light of the government's present concession that, but for the question of state law discussed below,

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permitted the payments to be deposited in the taxpayer's unrestricted checking account rather than applied to its debt. In *Arthur Co.* v. *Chicago Paints, Inc.*, 175 F. Supp. 50 (D. Minn.), the court noted that the bank had taken a general assignment of accounts receivable or to become receivable, and the assignments were not recorded.

[3] In the courts below, petitioner contended that it was a "pledgee" of the accounts receivable and thus one of the specifically enumerated classes of creditors protected under Section 6323(a) even against prior, but unrecorded, tax liens; it did not specifically argue that its lien, even though not a "pledge," was nevertheless perfected and choate and thus senior to the tax lien because prior in time, a basis of priority which, as petitioner now rightly observes (Pet. 7, n. 2), does not depend upon qualifying within one of the classes specified in Section 6323(a). The government's brief, in turn, was limited to the issue as then framed by petitioner and argued only (in addition to the state law question, *infra*) that, there being no delivery of physical possession which would give control over the property, the assignments could not qualify as "pledges." Thus, while the contention that the assignments, even if not pledges, were prior choate liens was made by an *amicus* brief and discussed at oral argument—at which government counsel contended that the liens were inchoate because the accounts receivable were estimates subject to revision—the court of appeals did not have before it full briefs by the parties on that question.

the assignments in this case did create a perfected and choate lien entitled to priority over the tax lien.[4]

2. A further question in this case is whether state law required the assignments to be recorded in order to be effective against third parties. If so, the failure of petitioner to perfect its lien under state law would make it ineffective against the federal tax lien. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50; *Illinois* v. *Campbell*, 329 U.S. 362, 371. That question turns upon the interpretation of two provisions of the Illinois statutes, one making "assignments" of accounts receivable effective without requiring them to be recorded,[5] and the other requiring a "mortgage" or any conveyance of personal property "having the effect of a mortgage or lien upon such property" to

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[4] That concession makes it unnecessary to consider petitioner's alternative contention here (Pet. 7–10) that the taxpayer had no "property" interest in the assigned accounts to which the tax lien could attach. We may note, however, that that argument, made for the first time in the petition for rehearing in the court of appeals in an effort to bring this case within the rationale of *United States* v. *Durham Lumber Co.*, 363 U.S. 522, and *Aquilino* v. *United States*, 363 U.S. 509, is foreclosed by the stipulation and district court finding that the amounts due on the contract "belonged" to the taxpayer (R. 7–8, 24). Nor do we agree that the result in this case is inconsistent, as asserted (Pet. 8–9), with *In re Halprin*, 280 F. 2d 407 (C.A. 3), and *City of New York* v. *United States*, 283 F. 2d 829 (C.A. 2). In *Halprin*, the court found a novation, and in *City of New York*, there had been a recorded absolute assignment to a general assignee for the benefit of creditors, who administered the property under court supervision.

[5] Ill. Rev. Stat., ch. 121½, sec. 221, set out at Pet. 11a–13a.

be recorded.[4] It is the government's contention that the provision making "assignments" of accounts receivable effective without recording applies only to absolute assignments or sales and not to assignments creating only a security interest, which in our view are properly to be classified as "mortgages" for state law purposes and are therefore required to be recorded.

Because of its view that petitioner's lien was inchoate for federal purposes regardless of its perfection as a matter of state law, it was unnecessary for the court of appeals expressly to consider the alternative interpretations of state law urged upon it. Its opinion does state that "Under Illinois statutes * * * an assignment of accounts receivable" is not required to be recorded (Pet. 3a), but that is literally only a paraphrase of the statutory assignment provision and was not, we believe, meant to resolve the question—irrelevant in its view of the case—whether "assignment" as there used is limited to absolute assignments or also includes assignments for security. There is in any event no need for this Court to examine the question of state law or to undertake to

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[4] Ill Ann. Stat. (Smith-Hurd), ch. 95, sec. 4, which provides:

> No mortgage, trust deed or conveyance of personal property having the effect of a mortgage or lien upon such property hereafter executed shall be valid as against the creditors of the mortgagor, even though admitted to record, as hereinafter provided, unless it shall be deposited for filing or recording in the office of the recorder of deeds * * *

Section 26 further requires that "All notes secured by chattel mortgages shall state on their face that they are so secured." There was no such notation here.

interpret the court of appeals' opinion on that question, since the question will be fully open to, and may be finally disposed of by, the court of appeals on the remand.

### CONCLUSION

The court of appeals has not had an opportunity to consider our concession that, apart from the failure to satisfy the state recording requirements, if any, the petitioner's lien in this case would satisfy the federal requirements of choateness and be prior to the subsequently-arising tax liens. Nor did it have the benefit of briefs specifically directed to that question. Under those circumstances, we believe that the more appropriate procedure would be for this Court, rather than itself consider the merits of our concession, to remand the case to the court of appeals to allow it to reconsider its decision in the light of that concession. It is submitted, accordingly, that this Court should grant the petition for certiorari, vacate the judgment below, and remand the case to the court of appeals for reconsideration in the light of the concession made by the government in this brief.

Respectfully submitted.

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DECEMBER, 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961